LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JUL 20 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 209

EMICH MOTORS CORPORATION AND U. S. ACCEPTANCE CORPORATION,

Petitioners,

vs.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THOMAS DODD HEALY,
HAROLD STICKLER,
A. BRADLEY EBEN,
208 S. La Salle Street,
Chicago 4, Illinois,
Counsel for Petitioners.

THE BLAKELY-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

Table of Cases.

Aetna Portland Cement Co. v. F. T. C. (C. A. 7), 157 F. (2d) 533, rev'd 333 U. S. 683 10

Bigelow v. RKO Radio Pictures (C. A. 7), 150 F. (2d) 877, rev'd 327 U. S. 251 ..... 10, 11, 23

Bigelow v. RKO Radio Pictures (C. A. 7), 162 F. (2d) 520 23

Brown v. U. S. (App. D. C.), 30 F. (2d) 474 22

Bruce's Juices v. American Can Co., 330 U. S. 743 14

Burton v. Driggs, 87 U. S. 125 45

Campbell v. Rankin, 99 U. S. 261 16

Case v. Los Angeles Lumber Co., 308 U. S. 106 19

Chesavoir v. U. S. (App. D. C.), 32 F. (2d) 945 23

Clem v. Meserole, 44 Fla. 234 17

Converse v. Sickles, 146 N. Y. 200, 4 N. E. 777 17

Devoe v. U. S. (C. A. 8), 103 F. (2d) 584 24

Dr. Miles Med. Co. v. John D. Park & Sons, 220 U. S. 373 29

Eastman Kodak Co. v. Southern Photo Materials Co. (C. A. 5), 295 Fed. 98, aff'd 273 U. S. 359 ..... 15, 17, 32

Emich Motors Corp., et al. v. General Motors Corp., et al. (C. A. 7), 181 F. (2d) 70 1

Everett v. Everett, 215 U. S. 203 23

Ford Motor Co. v. Union Motors Sales Co. (C. A. 6), 244 Fed. 156 29

Ford Motor Co. v. U. S., 335 U. S. 303 ..... 7, 8, 21

General Motors Corp. v. F. T. C. (C. A. 2), 114 F. (2d) 33 ..... 9, 28

Gibson v. Robinson, 90 Ga. 756 17

Goldstein v. U. S. (C. A. 8), 63 F. (2d) 606 32

Haggar Co. v. Helvering, 308 U. S. 389..... 19
Harrison v. U. S. (C. A. 6), 200 Fed. 662..... 32
Hartford Acc. & Ind. Co. v. Collins-Dietz-Morris Co. (C. A. 10), 80 F. (2d) 441..... 45
Helvering v. Gowran, 302 U. S. 238..... 42
Hexter v. Bast, 125 Pa. 52, 17 A. 252..... 17
Hopkins v. Lee, 5 U. S. 26..... 16
Hornbuckle v. Stafford, 111 U. S. 389.....16, 19
Huff v. U. S. (C. A. 5), 228 Fed. 892..... 24
Keck v. U. S., 172 U. S. 434..... 19
Kiefer-Stewart Co. v. Jos. E. Seagram & Sons (C. A. 7), ... F. (2d) ..... (unreported) Docket No. 10,001, decided May 9, 1950.....10, 29
Lisenba v. California, 314 U. S. 219..... 24
Little Bros. v. Barlow, 37 Fla. 232..... 17
Local 167 v. U. S., 291 U. S. 293..... 23
Maltz v. Sax (C. A. 7), 134 F. (2d) 2..... 14
May v. U. S. (App. D. C.), 175 F. (2d) 994..... 32
Medicine Co. v. U. S. (C. A. 8), 253 Fed. 694..... 32
Mercoid Corp. v. Minneapolis-Honeywell Reg. Co. (C. A. 7), 133 F. (2d) 811, rev'd 320 U. S. 680..... 10
Packet Co. v. Sickles, 72 U. S. 580..... 16
Palmer v. Hoffman, 318 U. S. 109..... 41
People v. Sawhill, 299 Ill. 393..... 45
Quemos Theatre Co. v. Warner Bros. (D. C., N. J.), 35 F. Supp. 949..... 14
Rankin v. Assoc. Bill Posters (C. A. 2), 42 F. (2d) 152 43
Rhoads v. City of Metropolis, 144 Ill. 580..... 24
Scotland County v. Hill, 112 U. S. 183..... 38
Shaw v. U. S. (C. A. 5), 41 F. (2d) 26..... 31

Small v. Penn. R. Co. (App. D. C.), 80 F. (2d) 704.... 31
Statler v. U. S., 157 U. S. 277..... 23
Stephens v. U. S. (C. A. 9), 41 F. (2d) 440..... 45
Story Parchment Co. v. Paterson Paper Co., 282 U. S. 555 .....11, 43
Twin Ports Oil Co. v. Pure Oil Co. (D. C., D. Minn.), 26 F. Supp. 366..... 15
U. S. v. Bausch & Lomb Optical Co., 321 U. S. 707..... 29
U. S. v. Cooper Corp., 312 U. S. 600.....14, 15
U. S. v. General Motors Corp., et al., U. S. D. C., N. D. Ill., E. Div., Civil Action No. 2177..... 25
U. S. v. General Motors Corp. (C. A. 7), 121 F. (2d) 376, cert. den. 314 U. S. 618.....1, 5, 7, 25, 26, 27, 31
U. S. v. Greater N. Y. Live Poultry C. of Comm. (D. C., N. Y.), 44 F. (2d) 393, 53 F. (2d) 518..... 23
U. S. v. International Salt Co., 6 F. R. D. 302, aff'd 332 U. S. 392..... 29
U. S. v. Maryland & Va. Milk Pro. Assn. (App. D. C.), 179 F. (2d) 426..... 29
U. S. v. Morton Salt Co. (C. A. 7), 174 F. (2d) 703, rev'd 338 U. S. 632..... 10
U. S. v. Socony-Vacuum Oil Co. (C. A. 7), 105 F. (2d) 809, rev'd 310 U. S. 150.....10, 29
U. S. v. Temple, 105 U. S. 97..... 22
U. S. v. Trenton Potteries, 273 U. S. 392..... 29
Washington Gaslight Co. v. District of Columbia, 161 U. S. 315 16
Welch v. Shumway, 232 Ill. 54..... 45
Williamson v. U. S., 207 U. S. 425..... 24
Young v. Black, 2 U. S. 669..... 16

Table of Texts.

American Jurisprudence, Vol. 20, p. 376; Vol. 30, pp. 993, 998 17

Corpus Juris Secundum, Vol. 31, pp. 193, 194..... 17

Greenleaf on Evidence (Rev. Ed., 1897), Vol. 1, pp. 812, 831 17

Jones on Evidence (4th Ed.), Vol. 2, pp. 1178, 1179... 17

Albert Shaw, The Messages and Papers of Woodrow Wilson, Vol. 1, pp. 54-55; quoted in 51 Cong. Rec., p. 15,826 15

Wigmore on Evidence (3rd Ed.), Vol. 1, Sec. 20, pp. 357-361 38

Table of Statutes.

United States Code:

T. 15, Sec. 15, 38 Stat. 731..... 3

T. 15, Sec. 16, 38 Stat. 731 (Set out at page 14) 2, 5, 6, 12, 14

T. 28, Old Sec. 695, new Sec. 1732, 49 Stat. 1561 (Set out at page 44) 11, 12, 44

T. 28, Sec. 1254, Par. (1), 62 Stat. 928..... 2

T. 28, Sec. 2101(c), 62 Stat. 961, 63 Stat. 104..... 2

United States Supreme Court Rule 38..... 2

Federal Rules of Civil Procedure, Rule 43 (a)..... 24

SPECIFICATION OF ERRORS.

Should a writ of certiorari issue, petitioners will urge that the Court of Appeals erred:

1. In construing Section 5 of the Clayton Act as not permitting: (a) the admission in the instant case of the indictment in the antecedent criminal case against respondents, nor (b) the judgment therein to be used as evidence that the conspiracy of which respondents had been convicted occasioned Emich Motors' cancellation;[1]

2. In determining, contrary to the record, that each and all of the following items of evidence were in fact excluded, or that certain of them were excluded on grounds mentioned in the opinion, and in holding that the exclusion of each such item was erroneous:

(a) testimony and letters of Emich Motors' customers that they were overcharged in installment purchases; the testimony of a GMAC employee regarding the so-called finance complaints received from Emich Motors' customers; and other evidence of so-called comparative finance charges;

(b) offers of proof with respect to petitioners' installment sales financing, including the testimony of a former bookkeeper of Emich Motors, and defendants' exhibit 173 for identification;

(c) evidence of the independent existence of matters not known to respondents prior to Emich Motors' cancellation but claimed to corroborate their frame of mind in effecting the cancellation;

(d) "some sixty" written service complaints by Emich Motors' customers received by defendants;

(e) testimony of dealers, including Emich Motors'

1. Related errors which also will be dealt with if the writ issues are: the Court of Appeals' misconstruction of the instructions given in the antecedent case and in the instant case; and its misconception of the limitation of the doctrine of estoppel by judgment.

successors, that they did not use GMAC and did not lose their franchises, and as to their testimonial qualifications.

3. In holding that arguments of petitioners' counsel aggravated the error of excluding evidence of comparative finance charges;

4. In holding the following evidence to be inadmissible:

(a) the estimates of Emich Motors' president as to its lost sales;

(b) the testimony of petitioners' accounting expert relating to Emich Motors' loss of earnings and petitioners' loss of good will, including his statements of what petitioners' books showed, his computations therefrom, and his selection of factors relating to good will.

5. In failing to evaluate the prejudicial effect of excluded admissible evidence on the basis of the context of evidence in the record; in attributing prejudicial effect to the exclusion of the following offers made in bad faith, namely, defendants' exhibit 173 for identification, and the offer through Emich Motors' former bookkeeper; in distorting a statement of plaintiff's counsel "You are going to rule us out of court if you make that ruling", as though it were a vital concession; in misstating the record and holding that prejudicial error resulted from the record as misstated; in failing to hold that excluded evidence of so-called comparative finance charges and customer complaints relating thereto and to matters of service were merely cumulative; and in failing to separately consider each exclusionary ruling on its own merits.

6. In failing to hold the amounts awarded were sustained by the evidence apart from that deemed inadmissible;

7. In its holdings of law as indicated in the Questions Presented (*post*, pp. 12-13).

8. In reversing the judgment of the District Court.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No.

EMICH MOTORS CORPORATION AND U. S. ACCEPTANCE CORPORATION,

Petitioners,

vs.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EMICH MOTORS CORPORATION and U. S. ACCEPTANCE CORPORATION, plaintiffs below, pray that a writ of certiorari be issued to review the decision of the Court of Appeals for the Seventh Circuit reversing the judgment of the District Court and remanding the case for a new trial.

Opinion Below.

The opinion of the Court of Appeals (R. 9448) is reported in 181 F. (2d) 70.

This case is founded upon the antecedent criminal case against defendants, reported as *U. S.* v. *General Motors Corporation*, 121 F. (2d) 376.

Jurisdiction.

The jurisdiction of this Court is invoked under U. S. C., Title 28, Section 1254, par. (1) (62 Stat. 928).

The decision to be reviewed was rendered by the Court of Appeals for the Seventh Circuit on March 3, 1950 (R. 9448), and a timely petition for rehearing (R. 9471) was denied on April 26, 1950 (R. 9551). This petition is being filed in conformity with, and within the time limited by, the provisions of Rule 38 of the Rules of this Court and U. S. C., Title 28, Section 2101(c) (62 Stat. 961, 63 Stat. 104).

Matter Involved.

The Court of Appeals has dealt the antitrust laws two severe blows. It has seriously impaired both their administration and enforcement, and their scope.

Section 5 of the Clayton Act (38 Stat. 731, U. S. C., T. 15, Sec. 16)[1] has been construed to make a prior conviction of antitrust law violators virtually useless as evidence in actions by their victims, contrary to Congressional intent. Thus, despite Section 5 and defendants' previous conviction, the private suitor will be forced to undergo the labor and expense of reproducing the Government's case in original evidentiary form and in all essential details.

Since the Government's choice between criminal and civil remedies is dictated, among other things, by the benefits of proof accruing to itself and private suitors in subsequent actions, the private suitors' loss of benefits in and of itself would discourage criminal prosecutions. But in view of the grounds of the decision which would take the benefits of the conviction away from the Government, as well, criminal prosecutions would become outmoded.

1. Statute set forth, *post*, p. 14.

If raised as a defense, a manufacturer's purpose to fix installment resale prices of independent dealers has been held to be lawful. This holding emasculates the prohibition of the antitrust laws against price-fixing, and as a by-product, in this and comparable cases, would add large amounts of evidence to the already out-sized record.

The united effect of these rulings, and others which open the door to huge masses of evidence, is to make the administration and enforcement of the antitrust laws impractical in a large number of cases. Defendants taking full advantage of pre-trial procedures could prevent a case from coming to trial; and trials once begun could be made to outlast juries, to say nothing of judge and counsel. In short, by these holdings, convicted offenders have been placed in a position where their monopoly power can be brought right into the halls of justice to make the destruction of their victims final and complete.

Statement of the Case.

Petitioners brought this action for treble damages pursuant to 38 Stat. 731 (U. S. C., T. 15, Sec. 15).

Petitioners are two related corporations: Emich Motors Corporation, which, between 1932 and 1936, operated two Chevrolet dealerships, one in Chicago and the other in a suburb, Oak Park (R. 1047, 8383); and U. S. Acceptance Corporation (formerly named E.M.C. Finance Co., and sometimes called "Emich Finance"), which was organized in July, 1934, to take over the financing of some of Emich Motors' installment sales, previously handled in substantial part directly by the latter (R. 1097).

Respondents, defendants below, are two corporations: General Motors Corporation, the automobile manufacturer (sometimes called "General Motors" or "GM"); and Gen-

eral Motors Acceptance Corporation, a related discount company (sometimes called "GMAC"). During and prior to 1936, GM sold its cars through Chevrolet and other of its car-selling corporate units to dealers such as Emich Motors, who were independent contractors (R. 382, 47, 79).

The substance of the instant case is that plaintiffs were injured by defendants' arbitrary withholding of cars and the cancellation of Emich Motors' dealerships pursuant to the criminal conspiracy in violation of Section 1 of the Sherman Act, of which defendants had been previously convicted.

The trial below exceeded four months and was the longest civil jury trial in the history of the Northern District of Illinois (R. 9413). The defense covered more than three months (R. 1602, 6970), involving 204 witnesses and 166 exhibits. This contrasts sharply with the fact that plaintiffs presented their side of the case in a three-week period (R. 322, 1594), using only 24 witnesses but introducing 407 exhibits consisting for the most part of General Motors' own documents previously introduced in the criminal case.

The jury returned verdicts in the amounts of $350,000 for Emich Motors and $62,000 for U. S. Acceptance Corporation (R. 9110-9112), which were trebled under the statute (R. 9112). An appeal was taken from this judgment. Subsequently, the District Court awarded costs and attorneys' fees to plaintiffs. A second appeal was taken, and the two appeals were later consolidated (R. 9555). Upon the consolidated appeal, the case was reversed and remanded for new trial (R. 9469).[1]

1. That the case was remanded for a new trial is without practical significance. Merely to repeat the four month trial would be an ordeal beyond petitioners' capacity. But since the holdings below would enable respondents to make a new trial interminably longer, a retrial becomes unthinkable.

Antecedent Criminal Case. Defendants had previously been tried by jury and found guilty of a criminal violation of Section 1 of the Sherman Act. (R. 31.) The indictment (R. 13-27) charged, in substance, that defendants engaged in a conspiracy to restrain interstate commerce in General Motors automobiles by coercing dealers to use GMAC, with the object of monopolizing the financing of said automobiles; and that defendants agreed to do and did "all acts and things and to use all means necessary and appropriate to make said restraint effective." (R. 21, 26.)

Judgments of conviction were entered in 1939 (R. 31) and affirmed by the Court below (121 F. (2d) 376);[1] and certiorari was denied. 314 U. S. 618.

Fred Emich, President of Emich Motors, was a principal Government witness in the criminal case. His testimony was summarized at considerable length by the Court of Appeals, which at that time referred to him as a typical victim of the conspiracy. 121 F. (2d), at p. 396.

Plaintiffs' Position. The complaint alleged that the conspiracy which injured plaintiffs was the same conspiracy of which defendants previously had been convicted. (R. 8-9.) Defendants, by their answer, denied this allegation (R. 31-32), and posed to the jury as a principal issue of fact whether the conspiracy in the two cases was the same. (R. 304, 7210, 7211.)

To prove the identicality of the conspiracy and to obtain the benefit of the prior conviction pursuant to Section 5 of the Clayton Act (38 Stat. 731, U. S. C., T. 15,

1. The opinion in the criminal appeal is very comprehensive and will aid materially in the understanding of the instant case which is founded upon the prior conviction.

Sec. 16), plaintiffs introduced into evidence the essential records of the antecedent case, including the judgment proper and the verdict and indictment incorporated therein by its terms. (R. 327-344.) Defendants themselves introduced the verdict which incorporated the indictment by its terms. (R. 8553.)

Ignoring the issue of identicality, the Court below construed Section 5 of the Clayton Act (a) as making the indictment inadmissible to the jury and (b) as not permitting the judgment of conviction to be used as evidence that the criminal conspiracy of which defendants were convicted occasioned Emich Motors' cancellation. (R. 9455-9456; see R. 9480, 9481.)

This raises squarely the question as to how the first part of Section 5 of the Clayton Act should be construed.

Plaintiffs contended that pursuant to the criminal conspiracy, the defendants tried to drive Emich Motors into the GMAC net, failing which they forced it out of the Chevrolet business. In doing so, Chevrolet applied coercion. Coercion, in the nature of the business relationship, meant the actual or threatened withholding of cars from dealers, for unless General Motors' demands upon a dealer were coupled with withholding, actual or threatened, the dealer would be under no actual duress to comply. In fact, as stated by defendants, "the only restraint of interstate commerce * * * charged or proved (in the criminal case) consists of the refusal of a manufacturer to ship to particular dealers. That is the theory on which the Government went to the jury and it is the theory on which the Circuit Court of Appeals upheld the conviction." (This Court, Oct. Tm., 1941, No. 352, Pet'n. for Cert., p. 23.) Thus, the over-riding issue in the criminal case was whether, to promote the use of GMAC by the dealers, General Motors' car-selling units and GMAC agreed that

the former would withhold cars from dealers not using GMAC. 121 F. (2d), at p. 399; see interpretation of criminal case by this Court in *Ford Motor Co.* v. *U. S.*, 335 U. S. 303, 316-317. The present case involved precisely the same issue, carried further, that is, whether the power to withhold cars, during the existence of the dealerships, and ultimately by cancellation of the dealerships, was exercised for such purpose in the case of Emich Motors, a member of the dealer class. (See respondents' concession that this was the issue, R. 7280.)

Defendants' Position. Defendants denied substantially all allegations of the complaint except that they had been convicted of a conspiracy and that Emich Motors' dealerships were cancelled. They contended that *despite their previous conviction, they were not guilty of any conspiracy and that the conviction meant nothing* (R. 8, 32, 7210-7211); in any event, that the conspiracy charged by plaintiffs was *not the same* conspiracy of which defendants were convicted (R. 304, 7210-7211); that no discrimination was practiced against Emich Motors with respect to obtaining delivery of its fair share of cars (R. 7293, 7294, 7280); and that the cancellation of Emich Motors' dealerships did not occur because of a conspiracy but rather for other reasons, principally because Emich Motors' sales on the installment plan were claimed to have been made on much higher credit terms than those of the so-called "6%" plan originated by GMAC and allegedly followed by other discount companies. (R. 8899, 8905.)

The Court of Appeals held this last-mentioned defense to be "legitimate" (R. 9465), disregarding that it amounted merely to an assertion that defendants were entitled to fix the resale price of Chevrolets sold by independent dealers on the installment plan. (R. 9515-9517; *post*, pp. 26-29.)

Nature of the Defense. In both the criminal case and this case, defendants conceded to the jury that the narrow issue was whether they confined their policy of promoting GMAC to mere "urging", as they contended, or whether they went beyond that to the point of "coercion", as the Government and plaintiffs contended.[1]

In the criminal case, defendants' chief counsel told the jury that dealers such as Emich Motors was represented to be were singled out for defendants' maximum efforts of persuasion, stating:

> "We make no bones about that at all. We not only admit it; we assert it. We want them to use it." (Crim. Rec., pp. 107-108.)

In this case, the same defense counsel developed the same theme to the jury at the outset:

> "The evidence will show, and it is perfectly true that GMAC was *constantly urging* upon Mr. Emich—we have no apology for that, we think it is a good thing for his customers and a good thing for him, and by him I mean *any* dealer—it is good business and it is good for the company, for the good will of General Motors, *he was constantly urged and encouraged and persuaded to use GMAC. There is no question about that at all* * * *." (R. 316-317; see, also, R. 304-305.)

But after thus narrowing the issue in this case, *defendants reversed their position, demonstrating their defense to be a complete sham.* In the face of these opening concessions to the jury, they tried to prove that Chevrolet

1. This was understood to be the narrow issue by the District Court in the criminal case (Crim. Rec., pp. 1938-1939) and this Court in *Ford Motor Co. v. U. S.*, 335 U. S. 303, 316-317.

The Criminal Record, this Court, Oct. Tm., 1941, No. 352, was identified as Plaintiffs' Exhibit 9 in the instant case and admitted by the trial judge for his use only. On stipulation, the Court of Appeals ordered that said exhibit need not be reprinted for purposes of reference in this Court, inasmuch as said Record is on file with the Clerk of this Court. (R. 9562-9561.) Said Record will be referred to as "Crim. Rec."

never so much as lifted a finger to promote GMAC with Emich Motors, or *any* dealer,[1] and that not even GMAC solicited Emich Motors' business for the last 1½ years of its dealership operations.[2]

This reversal in strategy occurred in the middle of the trial, in plain view of the jury, and by its open dishonesty was such striking evidence of guilt as to prejudice the defense beyond repair.[3]

Having cast themselves adrift from the truth, defendants shaped a grand strategy to confuse and overwhelm.

To implement this design, they used an extravagance of manpower and unlimited funds with which to produce an

---

1. The Chevrolet officials responsible for Emich Motors' cancellation carried out this reversal to the extreme of disclaiming any efforts to influence any dealer to use GMAC—a transparently false position as seen from the record (*post*, pp. 36-37) and from the findings of the Federal Trade Commission that Chevrolet actively participated in the extensive advertising campaign to sell GMAC. *General Motors Corp.* v. *F.T.C.* (C. A. 2), 114 F. (2d) 33, 34-35.

2. Witness the testimony of Defendants' employees:

GMAC branch mgr. *Hutcheson*: I knew Emich "slightly • • • calling on him once • • • in late 1933 or early 1934. • • • I positively did not solicit any retail business (from Emich) after that date. • • • GMAC did not solicit any retail business (from Emich) after that date." (R. 3430, 3434.)

GMAC field representative *Jones*: "I was not acquainted with Fred Emich. I never solicited any business from Mr. Emich's organization." (R. 4279.)

GMAC assistant branch mgr. *Gentlemen*: "I knew (Fred Emich) was a dealer. I didn't know him otherwise, I never solicited retail business from him for GMAC." (R. 4159.)

GMAC branch mgr. *Moore*: "I became acquainted with Fred Emich. I never solicited his retail business. I did not instruct my subordinates to solicit his retail business." (R. 4420.)

This was all the defense evidence as to GMAC's solicitation of Emich Motors' retail business!

Carrying this reversal to a nonsensical extreme, a different defense counsel made the following closing argument (R. 7320):

> "• • • GMAC was not even interested in his retail • • • if Mr. Emich was solicited by GMAC after that *why didn't he bring in some of the people who solicited him?*"

It is noteworthy that GMAC had destroyed its dealer contact reports as to Emich Motors which would have shown the solicitation. (*post*, p. 37). See GMAC's letter, R. 8377-8378, showing solicitation even on the eve of Emich Motors' cancellation.

3. This change in strategy is manifestly attributable to defendants' belated realization that to follow the blue-print mapped out by their chief counsel would be to corroborate plaintiffs' evidence almost in its entirety. The difficulty of following the blue-print while attempting to overcome plaintiffs' showing of coercion became too great to risk.

unprecedented outpouring of compliant witnesses voicing refrains.[1]

And to hedge against defeat in the trial, they created a possibility of victory upon appeal by making spurious offers through which to inflame the reviewing court against plaintiffs.

Despite the patent incredibility of the defense, defendants deliberately chose to gamble the whole case on the credulity of the jury, asking that the verdict rest entirely on the jury's decision as to which side was telling the truth. As stated by defense counsel, "If I haven't demonstrated that the truth is with us, I don't want any consideration." (R. 7284.) Under these circumstances, the verdict must be regarded as a jury finding that the defense was a complete fabrication.

The Court Below Made a Wide Departure From the Accepted and Usual Course of Judicial Proceedings. Notwithstanding that defendants, upon review, never challenged the sufficiency of plaintiffs' evidence concerning the conspiracy and its execution against plaintiffs, the Court of Appeals overthrew the jury finding.

Defendants' strategy, unsuccessful in the trial court, prevailed in the Court of Appeals, apparently because attuned to an intermittent mood reflected in a substantial number of decisions of that Court hostile to the antitrust laws.[2]

---

1. See Appendix, p. i. Certain advantages arose from this strategy. The threat of facing a mass-produced defense would discourage other dealers from suing, no matter how meritorious their cases. Moreover, this case, not only in the trial stage but also in the appeal, could be made a medium for the testing of new lines of defense for the purpose of the Government's pending equity suit brought as a sequel to the criminal case (*post*, p. 25).

2. *U. S.* v. *Socony-Vacuum Oil Co.*, 105 F. (2d) 809, rev'd 310 U. S. 150; *Mercoid Corp.* v. *Minneapolis-Honeywell Reg. Co.*, 133 F. (2d) 811, rev'd 320 U. S. 680; *Bigelow* v. *RKO Radio Pictures*, 150 F. (2d) 877, rev'd 327 U. S. 251; *Aetna Portland Cement Co.* v. *F. T. C.*, 157 F. (2d) 533, rev'd 333 U. S. 683; *U. S.* v. *Morton Salt Co.*, 174 F. (2d) 703, rev'd 338 U. S. 632; *Kiefer-Stewart Co.* v. *Jos. E. Seagram & Sons*, ... F. (2d) ..... (as yet unreported; docket No. 10,001, decided May 9, 1950, mentioned, *post*, p. 29, footnote).

In this case, the Court below openly by-passed the plaintiffs' evidence (R. 9452, 9469); ignored the glaring dishonesty of the defense which no further amount of evidence could dispel; based the reversal upon trial court rulings never made, upon argumentative positions never taken and upon principles of logic abandoned;[1] and disregarded the most rudimentary principles of review. (*Post*, pp. 33-43.)[2]

Moreover, the Court of Appeals selected this extraordinary case for the revival of obsolete concepts of the degree of "certainty" required in the proof of damages (R. 9467-9468) and the imposition of serious handicaps in methods of making such proof. Under these rulings, for example, the President of Emich Motors is not permitted to estimate lost sales, despite this Court's holding in *Story Parchment Co.* v. *Paterson Paper Co.*, 282 U. S. 555, 567. Plaintiffs' expert, a certified public accountant, may not testify as to what the books of plaintiffs showed and make computations therefrom, unless he has first made a detailed audit—this despite the public policy expressed in U. S. C., T. 28, former Sec. 695, now Sec. 1732, and despite decisions of this Court, other Courts of Appeal and Illinois courts. Further, the Court below paid no heed to other substantial evidence of damages which was more than ample to sustain the verdict, including proof of the earnings of comparable dealers, as sanctioned by this Court in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251.

---

1. The so-called "negative" testimony and "uncorroborative" evidence, *post*, pp. 30-33.

2. These matters were brought to the attention of the Court below. R. 9493-9518.

Questions Presented.

1. Where defendants have been previously convicted of an identical criminal conspiracy to violate the antitrust laws, what benefits of proof were intended to be conferred by Section 5 of the Clayton Act (38 Stat. 731, U. S. C., T. 15, Sec. 16) upon their victims who institute treble damage actions against them as a sequel to the criminal conviction?

2. Can a manufacturer and a discount company, defendants in a treble damage action under the antitrust laws, maintain a defense which amounts to an assertion that the purpose of the manufacturer in cancelling the dealerships of plaintiff-dealer was to carry out a joint policy of the defendants designed to fix the retail installment price of cars owned and sold by dealers as independent contractors?

3. Should not the policy of sustaining a judgment upon review be given its strongest application where the trial was protracted by defendants to extraordinary lengths in order to achieve a victory by confusion and attrition, particularly where the record shows that the defense was a sham?

4. Should defendants be permitted to introduce huge masses of evidence making the trial of large conspiracy cases impractical: (a) so-called negative testimony and (b) matters offered to corroborate frame of mind which did not enter the mind?

5. Was it improper to admit the testimony of the president of plaintiff-dealer as to his estimate of lost sales?

6. Does public policy, as reflected by statute (49 Stat. 1561, U. S. C., T. 28, old Sec. 695, new Sec. 1732), make admissible the testimony of plaintiffs' certified public accountant consisting of summarizations and computations

from plaintiffs' books, without his first making an audit, where the books were made available to defendants in the courtroom, qualified for admission into evidence under said statute, but not offered?[1]

SPECIFICATION OF ERRORS.

Because of the substantial duplication between the Questions Presented and the Specification of Errors, petitioners have located the latter immediately after the Table of Statutes, *ante*.

1. Other questions, some of which are treated cursorily here and which will be more fully developed if certiorari is granted, are:

Appellate Review:

the significance to be given to offers made in bad faith (*post*, pp. 38-41); to allegedly erroneous admissions of estimates and computations concerning damages where the jury's verdict is supported by other evidence unassailed;

the propriety of the Court of Appeals' approach to this case upon review: holding exclusionary rulings prejudicial without considering that the evidence was merely cumulative; passing upon trial court rulings without separate consideration of each upon its own merits; predicating error upon misstatements of the record and trial court rulings never made.

Damages:

the propriety of the computations of plaintiffs' certified public accountant insofar as they were constructed from net operating earnings before withdrawals by the officer-owner and before federal income taxes, and insofar as his computations concerning good will involved a selection of factors.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT.

I.

Section 5 of the Clayton Act, of Vital Importance to the Enforcement of the Anti-Trust Laws, Has Not Been Construed in Pertinent Part by This Court. Such Construction Is Imperative Because of the Stultifying Effect and High Precedent Value of the Decision Below.

The Statute and Its Importance. The pertinent provisions of Section 5 of the Clayton Act (38 Stat. 731, U. S. C., T. 15, Sec. 16) are:

> "A final judgment or decree rendered in any criminal prosecution * * * brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment * * * would be an estoppel as between the parties thereto: * * *."

This case squarely presents to this Court, for the first time since enactment of the statute thirty-six years ago, the question as to what benefits of proof were intended to be conferred thereby upon a private suitor.[1]

Since the right of private action is a principal means of enforcing the antitrust laws[2] and many of such actions follow as an aftermath of Government litigation, the construction of the statute has far-reaching importance. Because the decision below stultifies the statute and has in-

1. Cf. *U. S.* v. *Cooper Corp.*, 312 U. S. 600, 609.

2. *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 752; *Maltz* v. *Sax*, (C. A. 7) 134 F. (2d) 2, 4; *Quemos Theatre Co.* v. *Warner Bros.*, (D. C., N. J.) 35 F. Supp. 949, 950.

ordinately high precedent value,[1] a review by this Court is imperative.

Public Policy of the Statute. The statute requires a liberal construction because of the considerations which impelled its enactment.

Large corporate offenders, with virtually unlimited manpower and money, have an immense advantage over their victim when he sues for redress and relief. Congress enacted Section 5 to mitigate this disequality, under the stimulation of a forceful message by President Wilson.[2]

The statute recognizes that the offender has already had a day in court and lost, and that it would be unfair to require the victim, in the President's words, "to set up and establish again the facts which the Government has proved." Thus, the Congressional intent was to save the victim "long and burdensome litigation." *Twin Ports Oil Co.* v. *Pure Oil Co.* (D. C., D. Minn.), 26 F. Supp. 366, 369; *U. S.* v. *Cooper Corp.*, 312 U. S. 600, 609.

---

1. There are no appellate decisions construing the statute in pertinent part, except *Eastman Kodak Co.* v. *Southern Photo Materials Co.* (C. A. 5) 295 Fed. 98, 101 (Affm'd 273 U. S. 359), with which the decision below appears to conflict in principle. The *Eastman Kodak* case held the Government's *complaint in equity* to be admissible in the subsequent private action, pursuant to the statute.

2. Albert Shaw, The Messages and Papers of Woodrow Wilson. Vol. 1, pp. 54-55; quoted in 51 Cong. Rec., p. 15,826:

> "There is another matter in which imperative consideration of justice and fair play suggest thoughtful remedial action. Not only do many of the combinations effected or sought to be effected in the industrial world work an injustice upon the public in general; they also directly and seriously injure the individuals who are put out of business in one unfair way or another by the many dislodging and exterminating forces of combination.
>
> "I hope that we shall agree in giving private individuals who claim to have been injured by these processes the right to found their suits for redress *upon the facts and judgments proved and entered* in suits by the Government where the Government has upon its own initiative sued the combinations complained of and won its suit * * *. *It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He cannot afford, he has not the power, to make use of such processes or inquiry as the Government has command of.* Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience."

The Holding. Nevertheless, the Court below adopted a very narrow construction. The sense of its holding is that the statute makes admissible to the jury one and only one document from the antecedent criminal case, namely, the "Judgment". The admission of the indictment was held to be error. (R. 9455.)

The jury instruction, as interpreted by the Court below, was held not to cure the error but to "aggravate" it. (R. 9455.)

ADMISSIBILITY OF THE JUDGMENT IN ITS COMPLETE FORM.

There are at least three compelling reasons why the indictment was admissible to the jury.

> *First, its admissibility was essential to establish that the conspiracy in this case was identical with that in the prior criminal case.*

Defendants not only made this an issue by their answer (R. 31, 32) but argued repeatedly and insistently to the jury that no such identicality existed.[1]

When such is the issue, this Court and other authorities have always permitted the pleadings in the prior case to go to the jury. *Hornbuckle* v. *Stafford*, 111 U. S. 389, 391, 393; *Young* v. *Black*, 2 U. S. 669, 670; *Hopkins* v. *Lee*, 5 U. S. 26, 29; *Campbell* v. *Rankin*, 99 U. S. 261-263; *Packet Co.* v. *Sickles*, 72 U. S. 580, 593, 594; *Washington Gaslight Co.* v. *District of Columbia*, 161 U. S. 315, 317, 319,

---

1. For example, the defendants argued in their opening statement (R. 304):

"It is true that the complaint says that it is the same conspiracy. *But is it?* That is a question of * * * what conspiracy was established by the judgment over there."

Similarly, defendants argued in closing (R. 7210, 7211):

"* * * that judgment (in the criminal case) is a *red herring* and had absolutely nothing to do with it (the instant case) * * * the (criminal case) was a *different trial* * * * *different* case * * * *different* witnesses."

321, 329.[1] This is a salutary rule, for without the pleadings, the jury lacks the information indispensable for resolving this issue.

The Court below ignored this ground of admissibility in opposition to this body of authority.

Second, the indictment was admissible to permit the jury to exercise its functions under the statute.

If the statute had given the prior adjudication a conclusive instead of a prima facie effect, a certain area of the case would have been fenced off from further consideration by the jury. The existence of the general conspiracy would have been conclusively established. Since, however, the statute gives the prior adjudication only a prima facie effect, the jury retains all of its function of determination over this area of this case no less than over any other.

That function, under the statute, is to weigh the adjudication in the earlier case, along with the other evidence adduced, to determine whether the conspiracy of which defendants were convicted has been established as existing for the purpose of this case. To discharge that function, the jury has to be given a full understanding of the contentions of the parties in the earlier case, the issues there made and litigated, and the verdict and judgment. To hold that it was erroneous for the jury to view even the pleadings is to take away any rational basis for its judgment, and thus to require it to do either the impossible or the irrational.[2]

1. To the same effect, see Am. Jur., Vol. 30, pp. 993, 998, and Vol. 20, p. 376; Greenleaf on Evidence (Rev. Ed., 1897), Vol. 1, pp. 812, 831; Jones on Evidence (4th Ed.), Vol. 2, pp. 1178-1179; C. J. S., Vol. 31, pp. 193-194; *Gibson* v. *Robinson*, 90 Ga. 756, 763; *Eastman Kodak Co.* v. *Southern Photo Materials Co.* (C. A. 5) 295 Fed. 98, 101, affm'd 273 U. S. 359; *Converse* v. *Sickles*, 146 N. Y. 200, 207, 4 N. E. 777; *Hexter* v. *Bast*, 125 Pa. 52, 72-73, 17 A. 252; *Little Bros.* v. *Barlow*, 37 Fla. 232, 234, 235; *Clem* v. *Mescrole*, 44 Fla. 234, 238.

2. The force of this argument is such as to justify the admission of the evidence as well. Plaintiffs, however, were not permitted to introduce to the jury the evidence in the prior case (R. 443).

Third, the indictment was properly admitted because the criminal judgment incorporated it by reference, hence was incomplete in meaning without it.

The Court of Appeals arbitrarily rejected this ground of admissibility. (R. 9456.)[1]

Exclusion of the Indictment Would Frustrate Public Policy. Realistically, the conviction, denuded of the indictment, would have little, if any, value in the face of the dramatic staging of the defense, during which more than 100 living witnesses were called to deny the conspiracy (R. 9330, 9364), including such high executives of General Motors as Chairman Sloan and Chevrolet President Coyle.

Especially is this true in view of the fact that the holding necessarily prevents plaintiffs from making any effective arguments to the jury as to the identicality of the conspiracy and the evidentiary weight to be attached to the conviction. Any departure in argument from the legalistic metes and bounds of the conviction as delimited by the Court below[2] would create the likelihood of reversible error.

Under these circumstances, plaintiffs could not safely avoid the time, labor and expense of reproducing the Government's case in its original form and in all of its details.

Thus, the statutory policy to relieve the private suitor of these burdens would be thwarted.

The Statute Sanctions the Admission of the Indictment. Because the construction of the statute by the Court be-

1. The judgment proper recited that it was based on a jury verdict of guilty "of the offense charged in the indictment" (R. 341-342). Moreover, the verdict, the admission of which was not held to be erroneous and which defendants themselves also introduced, found the defendants "guilty in manner and form as charged in the indictment" (R. 341, 8553).

2. The opinion below apparently would limit the jury instructions to a statement that the conviction was "prima facie evidence that defendants had been guilty of a conspiracy to restrain dealers' interstate trade and commerce in General Motors' cars for the purpose of monopolizing the financing essential to the movement of those cars" (R. 9454).

low leads to absurd results and frustrates public policy, it must be disfavored unless compelled by the terms of the statute. *Haggar Co.* v. *Helvering*, 308 U. S. 389, 394.

No such compulsion exists. When courts have permitted the introduction to a jury of a previous "judgment" to prove the facts upon which it is founded, they have always understood the term as meaning the judgment in its *complete* form—as being synonymous with the entire record. *Hornbuckle* v. *Stafford*, 111 U. S. 389, 391, 393, and other authorities cited, *ante*, pp. 16-17. Therefore, when Congress authorized the admission of the "final judgment" to prove the facts upon which it was founded, it must be presumed to have employed that term in its established legal signification. *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115; *Keck* v. *U. S.*, 172 U. S. 434, 446. In short, under the wording of the statute, the entire record, and certainly the indictment, was admissible to the jury.

PROPRIETY OF THE INSTRUCTIONS.

Holding as to Instructions. The Court of Appeals held, in effect, that any instruction short of one which told the jury to ignore the indictment was improper. But this was based upon its erroneous belief that the indictment was inadmissible.

The instruction given was proper, even as interpreted by the court below.

The instruction was interpreted as though it permitted the jury to consider the indictment to be evidence of Emich Motors' cancellations. (R. 9455-9458).[1] So inter-

1. This represents a grievous distortion of its meaning. The instruction given created the over-all impression in the mind of the jury that the criminal judgment, of which the indictment was an integral part, was in evidence as prima facie proof of one and only one issue, the conspiracy; and that the indictment served merely to define, describe and limit the scope of the judgment. See Appendix, p. i.

preted, it was held to "aggravate" the error of admitting the indictment. The Court below reasoned as follows: (1) the prior criminal case was multifarious in the sense that the indictment therein charged more than one means or act, proof of any of which may have been the basis for the verdict and judgment (R. 9455-9459); (2) the statute incorporates by reference the doctrine of estoppel by judgment with all of its conventional limitations and restrictions;[1] and (3) the doctrine of estoppel by judgment is such that where an indictment charges a conspiracy involving more than one means or act, and the jury instruction is a stock instruction permitting a verdict of guilty upon a finding of less than all alleged, the judgment is evidence of no particular one of the means and acts, regardless of the evidence supporting each. (R. 9452-9459.) It concluded, therefore, that an instruction which would permit the indictment to be used as evidence of cancellations would be improper.

Each of these propositions is unsound, but in any event such an instruction would have been proper.

First, however, it is important to consider the paradoxical effect of the holding.

Detrimental Impact Upon Private Suitors[2]. The holding leads to results which are most bizarre and intolerable.

In practice, Government enforcement of the antitrust laws is limited to cases of the larger conspiracies, frequently involving numerous means and acts, in which

1. The opinion does not explicitly state that it construed the statute as incorporating by reference the doctrine of estoppel by judgment as stated in the text. However, the opinion can be read no other way, as may be seen from the express language used, from its recital of defendants' arguments demonstrating their total reliance upon this doctrine, and from the fact that the conclusion coincides almost entirely with that which defendants claim should result from the application of said doctrine. See R. 9449-9459.

2. The impact of this rule upon the Government is shown, post, at pp. 25-26.

stock instructions are given comparable to those in the General Motors criminal case. Moreover, only the most flagrant violators are prosecuted criminally. Thus, under the holding, victims seeking redress or relief are confronted with the following paradox:

> Because a conspiracy was large, with many means and acts; because the violation was so flagrant as to warrant criminal prosecution; because the broad dimensions of the conspiracy were such as to make the difficulties and expense of proof most severe for the victim—*precisely then, the statute is to be construed as giving the smallest possible measure of assistance to the victim.*

Needless to argue, Congress never intended such an incongruous result. Therefore, the construction adopted by the Court of Appeals must be disfavored unless the words of the statute can be given no more sensible meaning.

Prior Case Was Not Multifarious. The criminal case turned upon one basic issue, that is, whether the defendants undertook to coerce dealers. Coercion and withholding of cars are synonymous. (*Ante*, pp. 6-7.) And withholding was effected by refusing deliveries or by cancellation of the dealerships. Therefore, contrary to the Court below, the criminal case was not multifarious and necessarily comprehended the cancellation of dealers not using GMAC, including Emich Motors.[1]

The Statute Does Not Incorporate by Reference the Doctrine of Estoppel by Judgment. Under the statute, the final judgment shall be prima facie evidence "as to all matters respecting which said judgment * * * would be an estoppel as between the parties thereto; * * *"

That the Court below was under no compulsion to read

1. See Appendix, p. iii. Also, see *Ford Motor Co. v. U. S.*, 335 U. S. 303, 316-317.

these words as though they incorporated by reference the doctrine of estoppel by judgment is clear from the fact that while the statute uses both the words "judgment" and "estoppel", it does not use the term of art, "estoppel by judgment".[1]

But in any event, even if the statute were deemed to embrace the doctrine, it did not embrace, as well, the limitations and qualifications of that doctrine in its narrow form.

There is a crucial difference between the application of estoppel by judgment in the ordinary case, as opposed to cases contemplated by the statute. In the former, the defendant is foreclosed absolutely from making any defense against matters previously adjudicated; hence caution is required in limiting the issues as to which the defense is precluded. But no such consideration obtains here, since defendants, under the statute, are not foreclosed in any manner whatsoever in conducting their defense, even as to those matters in respect of which the prior adjudication would constitute a so-called "estoppel".

Thus, *arguendo*, if the statute is deemed to refer to the doctrine, such reference is for purposes of analogy only. There being no true estoppel under the statute, it is manifest that the scope of the prior adjudication should not be compressed rigidly and inelastically into the conservative mold of estoppel by judgment as applied in the ordinary case, especially where to do so defeats the strong public

1. To inject this term of art into the statute is, in effect, to take undue advantage of the propinquity of these words, and to re-word the statute as though it read that the judgment was to be evidence "as to all matters respecting which said judgment * * * would be an estoppel as between the parties thereto *in a subsequent suit by the Government on a different cause of action*." Yet the italicized words are not to be found in the statute, no more so than the term of art, "estoppel by judgment."

It is elementary that courts will not add words to a statute. *U. S.* v. *Temple*, 105 U. S. 97, 99, especially when to do so will frustrate a strong public policy to which the statute gives expression. *Brown* v. *U. S.*, (App. D. C.), 30 F. (2d) 474, 475.

policy to mitigate, insofar as possible, the disequalities between the parties in litigating anew matters which defendants have already litigated to the hilt.

The Scope of Estoppel by Judgment Has Been Misconceived by the Court Below. The holding of the Court below in this respect appears in sharp conflict with the leading case of *Local 167* v. *U. S.*, 291 U. S. 293, 298, 299.

The *Local 167* case stands for the proposition that where defendants have been convicted of a conspiracy in violation of the antitrust laws, it is a sham for them to deny, in a subsequent equity suit by the Government, that the conspiracy involved the several means and acts alleged in the indictment, realleged in *haec verba* in the subsequent complaint and specifically enjoined by the decree.[1]

This is in accord with the rule that a general verdict of guilty will be interpreted as a finding of guilt as to all that the indictment well alleges. *Statler* v. *U. S.*, 157 U. S. 277, 279, and authorities cited therein; also *Chesavoir* v. *U. S.* (App. D. C.), 32 F. (2d) 945, 946, 947.

See, also, *Everett* v. *Everett*, 215 U. S. 203, 215-216, holding that where the earlier adjudication may have been founded upon one or more of the material issues raised therein, the presumption arises that all such issues were

1. The pertinent reported opinions of the District Court in the *Local 167* case are found at 44 F. (2d) 393, 394, and 53 F. (2d) 518, 519, 520.

The means and acts alleged in the indictment in that case were numerous and the instructions of the District Court were closely comparable in all material respects to those in the General Motors' criminal case. If any ambiguity in the verdict arose because of the nature of the criminal case instructions in the instant case, the same ambiguities necessarily arose under the criminal case instructions in the *Local 167* case. Cf. *Bigelow* v. *RKO Radio Pictures*, 162 F. (2d) 520, 522, in which the instructions of the District Court in the treble damage trial which preceded the equity phase of the case were also comparable to those in the General Motors criminal case. See printed record, pp. 1266, 1267, in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, Oct. Tm., 1945, No 444,

actually determined. This is the general rule, followed in Illinois. *Rhoads* v. *City of Metropolis*, 144 Ill. 580, 586.[1]

The Instruction Was Proper in Any Event The instruction, even if permitting the indictment to be considered evidence of cancellations, would be proper despite the limitations of the doctrines of estoppel by judgment as conceived by the Court below, because no uncertainty existed as to the facts upon which the conviction was founded. As seen, that case turned upon the element of coercion of the dealers—a coercion synonymous with the withholding of cars by cancellations of dealerships. (*Ante*, pp. 6-7.)

Finally, such an instruction would be proper upon elementary considerations of relevancy.

The statute was construed to make the judgment admissible to prove the conspiratorial agreement. (R. 9454.) Since, by definition, agreement means a frame of mind, this holding necessarily signifies that the judgment is proof of the frame of mind to do the acts germane to the agreement. Cancellation of the dealerships, of course, is such an act.

There was no dispute that Emich Motors' dealerships were cancelled. The sole issue concerning the cancellations was whether they occurred with the frame of mind to carry out the conspiracy. (R. 9459.) Therefore, the judgment was admissible as evidence that the cancellations were effected with the conspiratorial frame of mind. *Lisenba* v. *California*, 314 U. S. 219, 227-228; *Williamson* v. *U. S.*, 207 U. S. 425, 450-451; *Devoe* v. *U. S.* (C. A. 8), 103 F. (2d) 584, 588-589; *Huff* v. *U. S.* (C. A. 5), 228 Fed. 892, 893.

---

1. That the Illinois rule is to admit the prior adjudication as prima facie proof of all material matters put in issue and litigated in the earlier case is in itself sufficient to warrant its admission for such purpose in this case, pursuant to the authority of Rule 43(a) (2nd sentence) of the Federal Rules of Civil Procedure.

Especially is this so where, as here, the conviction could not have occurred unless the jury in the criminal case found a design to coerce dealers by cancelling their dealerships, and where a fair appraisal of the whole criminal case shows that the proof of such coercion was overwhelming.[1]

Detrimental Impact Upon the Government. In view of the holding regarding the limitations of estoppel by judgment, the Government, seeking to implement a criminal conviction with equitable relief, will be forced to marshal anew and present once again the very same evidence upon which it obtained the criminal conviction.

Faced with the burden and cost of twice litigating the same matters and aware of the Court of Appeals' holding that private suitors would obtain no substantial aid from a criminal prosecution, the Government inevitably would recast its policy, rely exclusively upon civil remedies, and abandon criminal prosecutions as being impractical.

This particular holding gives promise of a prospective victory of major proportions for the defendants in the Government's pending equity suit brought as a follow-up to the criminal prosecution of General Motors.[2] The

1. In the criminal case appeal, the Court of Appeals held (121 F. (2d) at pp. 398, 399):

"* * * we would have no difficulty * * * on a *de novo* analysis of the record, to conclude that the appellants were in a position to impose and did impose their will on the independent dealer-purchaser * * * as to whether he would conduct (his business) at all (p. 398) * * *."

"When the evidence is boiled down, it is seen at once that the appellants agreed among themselves not to do business with any dealer who would not purchase the retail and wholesale service from GMAC * * *. In the usual case the recalcitrant dealer had become firmly established * * * when he was given the ultimatum either to use GMAC or to liquidate his business (p. 399) * * *."

2. "*U. S.* v. *General Motors Corp., et al.*" U. S. D. C., N. D. Ill., E. D. Civil Action No. 2177.

The monopoly objective of the criminal conspiracy, as alleged in the indictment, and the identical means and methods therein alleged, are realleged in the amended complaint, the Government arguing that these matters all have been determined in the criminal suit.

Government will be put to proof again of all the matters which the Court of Appeals, in affirming the criminal conviction (121 F. (2d) 376), held were proved beyond a reasonable doubt.

II.

By Sanctioning a Price-Fixing Purpose as a Defense, the Court Below Has Seriously Restricted the Prohibition of the Antitrust Laws Against Price-Fixing, in Conflict With This Court's Decisions.

Another question of wide public importance is presented by that part of the Court of Appeals' holding which, in effect, sanctions a price-fixing purpose as a defense to an action under the antitrust laws.

Defendants sought to corroborate the Chevrolet officials' assertions that Emich Motors' cancellation was based in part upon their belief that customers of Emich Motors purchasing on credit, *i. e.*, on the installment plan, were paying a greater amount additional to the cash delivered price than would have been charged under the so-called 6% plan of installment selling. (R. 9462, 9463.)

Despite its holding in the antecedent criminal case that such evidence was properly excluded,[1] the Court of Appeals held the defense to be "legitimate" in this case (R. 9465), ignoring plaintiffs' contentions that the defense is illegal, amounting merely to an assertion that defendants were

1. In the criminal appeal, the Court of Appeals upheld the exclusion of substantially identical evidence offered for a similar purpose, stating (121 F. (2d) 376, at pp. 406-407):

"Such was the nature and object of the conspiracy that by its necessary operation * * * it would directly and unduly impede and burden the interstate trade and commerce of the dealers * * * the offered evidence was not logically relevant to any of the controverted issues in the case and hence was properly excluded * * *."

The District Court in the criminal case rejected every effort to inject this evidence and issue into the case, as being immaterial. (E. G., Crim. Rec. 893-896.)

The reasons why such evidence was at most collateral are shown, *post*, 39-40, footnote.

entitled to fix the dealers' installment resale prices and to cancel non-conforming dealers. (R. 9515-9517.)

In the criminal case, the price-fixing purpose of the conspiracy was not brought to the fore until defendants, seeking review in this Court, questioned whether the evidence proved that they fixed the dealers' resale prices. (Pet'n for Cert., p. 11, par. 1(e), this Court, Oct. Tm. 1941, No. 352.)[1]

The fixing of resale prices on the installment plan was accomplished by fixing the resale price for cash and then fixing the amount added to the cash price when cars were sold on the installment plan.

Defendants fixed the cash resale price by: (a) writing into the selling agreements with the dealer a schedule of "suggested retail delivered prices" (R. 68, 9434, 9446), which informed the dealer of the resale prices contemplated by Chevrolet; (b) stipulating in said agreements that Chevrolet would conduct an advertising campaign in the name of the individual dealer, through its central office in Detroit (R. 64-65, 7715); and (c) advertising locally, in the dealer's name, that he sold at the prescribed price. (R. 7865, 7866, 627.)[2]

Compliance with these prices was assured, inasmuch as the customer would insist upon the advertised price. To facilitate his ability to compare such price with the invoice price, the selling agreement required the dealer to segregate on the invoice the price of the car as such from added charges for freight, handling and delivery. (R. 55, 68.) Failure to sell at the advertised price would result in the dealer's cancellation, since the customer would register a complaint which defendants regard as sufficient justification for cancelling the dealer. (R. 38, 42, 2938.)

1. Prior thereto, the purpose which was emphasized was the obvious one of making profits. 121 F. (2d) at pp. 383, 386, 392, 397, 400.

2. This form of advertising is being carried on by General Motors today. Appendix, pp. xiii, xiv.

To regulate, as well, the dealers' installment sales (60% of the total, R. 7797), defendants forced dealers to use installment "rates neither higher nor lower" than GMAC's (R. 8070), thus making the dealers' installment delivered price equal the prescribed cash delivered price, plus the price differential specified by the GMAC plan.[1]

As in the case of the cash resale price, defendants' leverage over the dealer was obtained through an advertising program. They spent millions of dollars implanting in the minds of prospective customers the false impression that every dealer automatically used and had to use GMAC for his installment sales. (R. 8680, 8677, 8679; see R. 8678: "General Motors dealers all over the United States are ready to serve you on this plan *Now, Today*"; R. 3125-3127; See Chevrolet's ad in the name of the dealer, R. 7865, 7866, 627.)[2] Laboring under the misimpression fostered by defendants' advertising, the customer would expect the dealer to use the GMAC plan, even without his requesting it. If the customer found out, during the negotiations or afterwards, that he had not received GMAC, he would complain of his dissatisfaction, especially if he requested GMAC and was refused it. (R. 2938, 2930; "The third," etc., R. 2931; 4425.) Thereupon, General Motors ingenuously took the position that it was justified in applying direct pressure upon the dealer to use GMAC in the form of threats to cancel or ultimate cancellation. (R. 2938.)

---

1. The dealers resisted the GMAC plan because under its recourse features, they were required to make good the delinquencies of their customers. (R. 7807-7808; 7741; 8066; Dealer *Lauth* was ruined by the recourse feature, R. 372-374, 378, 380, 381.) Moreover, under that plan they were forced to forego sales where customers could not pass GMAC's rigid credit requirements or would not meet its inflexible credit terms of one-third down and the balance in not more than 18 months. (R. 7747, 7799.) For example, of 141 transactions selected for reference in Defendants' Exhibit 173 for identification, 30 were sales which could not have been made under the GMAC plan. (R. 8982-8984.)

2. The nature and extent of this campaign are discussed in *General Motors Corp.* v. *F. T. C.*, (C. A. 2) 114 F. (2d) 33, 34-35. GMAC's current advertising carries the same representations to the public. Appendix, p. xv.

Thus, the holding of the Court of Appeals in this respect appears to be squarely in conflict with the doctrine, if not the holding, of this Court in *Dr. Miles Med. Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 405, 407-408, and with *Ford Motor Co.* v. *Union Motor Sales Co.* (C. A. 6), 244 Fed. 156, 157, as well as in disregard of this Court's repeated pronouncements that price-fixing is unreasonable and unlawful *per se*. *International Salt Co.* v. *U. S.*, 332 U. S. 392, 396; *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 719-720; *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 224; *U. S.* v. *Trenton Potteries*, 273 U. S. 392, 396-402.[1]

Since this defense is illegal, defendants have no right to assert it, and no error may be predicated upon its exclusion. *U. S.* v. *International Salt Co.*, 6 F. R. D. 302, aff'd 332 U. S. 392, 401; *U. S.* v. *Maryland & Va. Milk Pro. Assn.*, (App. D. C.) 179 F. (2d) 426, 428.

The public importance of this question requires no elaboration.

1. Cf. the decision of the Court below, even more recent than the instant case, squarely holding that maximum price fixing is legal. *Kiefer-Stewart Co.* v. *John E. Seagram & Sons*, ... F. (2d) ....., decided May 9, 1950. In that case, the Court of Appeals reverted to the test of "reasonableness" which it had applied in the *Socony-Vacuum Oil Co.* case and which this Court there rejected.

III.

The Trial of Large Conspiracy Cases Is Made Impractical by the Holding Below Permitting Introduction of Huge Masses of So-Called Negative Testimony and Uncorroborative Evidence. The Holding Conflicts With Decisions of This Court and of Other Courts of Appeals.

NEGATIVE TESTIMONY.

Additional to its 204 witnesses, defendants offered 91 more dealer-witnesses to testify to the negative fact that they were non-users of GMAC who were not victimized by the conspiracy. (R. 8993-9003, 9005, 9006.)[1]

Although defendants briefed no arguments concerning the exclusion of this offer, the Court below held the exclusion to be "borderline" error, asserting that it failed to perceive "why the evidence of (plaintiffs' dealer-witnesses) that they lost their franchises for failure to use GMAC should have any more probative value as to the issue of impact of the conspiracy on Emich than that of the same or any other number of other dealers that they did not use GMAC and did not lose their franchises." (R. 9467.)

In the face of this caveat, it would be unreasonable to expect a trial court to exclude such testimony when offered upon a retrial. In its practical effect, therefore, this amounts to a holding of error.

The holding is unsound as a matter of simple logic. Since the testimony of the 91 is not directed to the same conversations or transactions testified to by any of plaintiffs' witnesses, it is not logically in combat therewith. There-

1. Fourteen had already testified to like effect. Gibson, Jr., R. 1663, 1664; Follett, R. 1705, 1706-1707; Cuene, R. 1713-1714; Holz, R. 1720; Laper, R. 1725-1726; Humphrey, R. 1733-1734; Pyle, R. 1753-1754; Recht, R. 1759, 1765; Dalton, R. 3100; Foster, R. 3096; Hunter, R. 2768; Hardy, R. 2879; Briggs, R. 2789; also, Dean, R. 4636, "Emich Motors' successor," contra the opinion below. (R. 9467.)

fore, such testimony cannot disprove such conversations or transactions, nor the inferences arising therefrom.

The Court below gave this precise reason for upholding the exclusion of identical negative testimony in the earlier criminal case, devoting thereto almost a full page. 121 F. (2d), at p. 405. See, also, *Shaw* v. *U. S.* (C. A. 5), 41 F. (2d) 26, 27, and *Small* v. *Pennsylvania R. Co.* (App. D. C.), 80 F. (2d) 704, 707, as well as other cases cited in the earlier opinion, with which the present opinion appears to be in conflict.

Such negative testimony could not even delimit the extent to which the conspiracy was carried out,[1] especially where only 91 out of GM's 15,000 dealers are offered. (R. 7194.) Whether or not carried out as to the 91, the conspiracy may well have been carried out as to all the rest. Thus, *arguendo*, if relevant at all, only when substantially all 15,000 are offered does any degree of relevancy attach to the testimony of any one. The rule against cumulative evidence could not be applied to shut off the flow of such testimony until virtually all 15,000 have been called.[2]

UNCORROBORATIVE TESTIMONY.

To "corroborate" the Chevrolet officials' asserted frame of mind concerning Emich Motors' cancellations, defendants made offers of matters *not* represented to have come

1. If all 15,000 dealers testified, such testimony would show that the majority used GMAC and only a minority did not. (R. 740.) If negative testimony was developed from all the minority, such testimony would merely prove that the conspiracy was not carried out as to such minority *as yet*. Moreover, the force of such negative testimony could be dispelled, in substantial part, by showing that GMAC did not want the business of all dealers (Crim. Rec., p. 107) and by showing that coercion was not applied when and where dealers were difficult to obtain or keep. To make the latter showing and to demonstrate which of the majority using GMAC did so because of coercion would require plaintiffs to engage in a vast program of investigation, pre-trial discovery and depositions, to say nothing of the burden and cost of introducing this huge volume of evidence at the trial.

2. In the antecedent criminal case, defendants offered to call "all" of the 15,000 dealers not called by the Government. 121 F. (2d), at pp. 404, 386.

to the knowledge of such officials prior to the cancellations, nor to have been relied upon by them in effecting the cancellations. These offers included, among others, the offer through Emich Motors' former bookkeeper and defendants' Exhibit 173 for identification, referred to specifically by the Court below. (R. 9462-9463.)

The Court of Appeals held the exclusion of such offers was erroneous, stating that defendants "were entitled to *substantiate* this defense by proof of *actual* irregularities" (R. 9463) and that "the fact of lack of knowledge * * * was *immaterial.*" (R. 9551.) (Italics supplied.)

This ruling, as in the case of so-called negative testimony, defies logic, for it is axiomatic that matters which do not enter the mind cannot affect one's decision.

The ruling opens the door to exploration of thousands of conversations, actions and transactions between the dealer, its employees, customers, trade associations, suppliers and third persons. And to what purpose? Merely to cast about for some hindsight justification of defendants' wrongful conduct; none of it illuminating the impelling reasons for cancellation; and all designed to lead the jury to the wholly unwarranted and illogical conclusion that matters which the defendants did not know nevertheless motivated them in effecting the cancellations.

The ruling appears to be in direct conflict with the holding of this Court in *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 375, and with the decision of the Court of Appeals for the District of Columbia in the recent case of *May* v. *U. S.*, 175 F. (2d) 994, 1008, 1009. See, also, *Goldstein* v. *U. S.* (C. A. 8), 63 F. (2d) 606, 615-616; *Medicine Co.* v. *U. S.* (C. A. 8), 253 Fed. 694, 697; *Harrison* v. *U. S.* (C. A. 6), 200 Fed. 662, 675.

These rulings could be a major weapon with which to defeat justice in large conspiracy cases. Unscrupulous

defendants, without a legitimate defense, could forestall a trial through interminable deposition procedures. Trials, if begun, would outlast juries.

These considerations are particularly relevant to the Government's pending equity suit against defendants, where already almost 500 dealer-depositions have been taken by the defense in delay of the case.

IV.

The Abandonment by the Court Below of Rudimentary Principles of Appellate Review Requires the Exercise of This Court's Supervisory Powers.

A. FAILURE TO REVIEW THE CASE IN THE CONTEXT OF THE RECORD.

It is manifest that to determine whether the exclusion of evidence deemed admissible works prejudice, the reviewing Court must consider the exclusions in the light of the evidence already in the record. This the Court of Appeals failed to do.

Not only did it openly by-pass the plaintiffs' well-nigh irrefutable showing of the conspiratorial frame of mind (R. 9452, 9469), but it also ignored the open dishonesty of the defense which none of the exclusions could have overcome. Petitioners submit that where the jury is made aware of the fact that the defense, as here, is compounded of a dishonest reversal in strategy, denials mass-produced and carried to ludicrous extremes, the destruction and doctoring of documents, the suppression of vital evidence, the tampering with witnesses and the like, it is not only an error of law but a travesty on justice to attribute prejudicial effect to exclusions, particularly where such excluded offers themselves are equally spurious.

Brief Analysis of Plaintiffs' Evidence. The Court below agreed that the pivotal question as to any particular act germane to the conspiracy was whether it was performed with the frame of mind to carry out the conspiracy. (R. 9459.)

Plaintiffs showed that the conspiracy originated in a classical conspiratorial meeting of Sloan and the other high officials of defendants in California in 1925.[1] Thereafter, and during all times material in this case, dealers experienced coercion, as seen from a large number of defendants' own documents,[2] and the testimony of two former Chevrolet employees,[3] as well as of Fred Emich and 16 other dealer-witnesses.

These dealers testified that their non-use of GMAC was the constant point of friction between them and the defendants, causing their excruciating delivery problems and the oppressive fear of having their deliveries cut off altogether through cancellation of their dealerships.[4]

Fred Emich's testimony and plaintiffs' documentary evidence was to the same effect. To illustrate, Emich Motors was being accused of poor sales performance and inability to keep sales managers (R. 8337-8338) during the first six months of 1935, when it was suffering severely from non-deliveries, unreasonable delays in deliveries and misdeliveries. The evidence showed that Emich Motors couldn't get cars (R. 1129, 8359-8361) even on the day before Chevrolet Zone Manager Hill wrote all dealers

1. R. 3868, 3878, 3887, 3894, 3895, 3794. See, also, Appendix, p. iv; also, 121 F. (2d) 376, 392-393.

2. *e. g.*, 46 GMAC reports showing how the "fear" of the car-selling unit was used to promote GMAC, R. 8180, 8117-8120, 8123-8185. See also Appendix, p. iv.

3. They told graphically how they "blacklisted" and "made life miserable" for such dealers, R. 409, 410, 411, 942-944.

4. *Blades*, R. 949; *Burger*, R. 535; *Cohn*, R. 386; *Craig*, R. 414; *Disher*, R. 577; *Dollahan*, R. 492; *Jones*, R. 681; *Lauth*, R. 355; *Leviton*, R. 447; *Magers*, R. 628; *Mendez*, R. 754; *Morrow*, R. 865; *Munson*, R. 869; *Patterson*, R. 474; *Smason*, R. 778; *Wilson*, R. 654. See, also, Appendix, p. v.

that cars were available to "fill all orders". (R. 8357-8358.)[1]

When Emich confronted Hill with the documentation of his rank discrimination, including the numerous pleading letters from Emich Motors' sales manager, Feehan, begging for deliveries, Hill minced no words: "You dumb so-and-so, why don't you wake up? * * * you had over a hundred time deals last month and you didn't give us a one. * * * If you don't do what I tell you, you won't be a Chevrolet dealer. * * * Tell that damn fool (Feehan) out there not to send any more of these orders." (R. 1135.)

Another severely incriminating item of evidence conclusively showing the conspiratorial frame of mind as applied to Emich Motors is the so-called Masterson report (R. 8344-8346), written in 1935 when Emich Motors was suffering most from lack of deliveries. Masterson, Chevrolet Regional Business Manager, suggested to Hill ways of compelling Fred Emich to take his money out of Emich Finance and place it in his dealerships, *i. e.*, by shipping him unwanted parts and trucks, by requiring expensive improvements and the increase of his sales force, etc. The report concludes: "By getting his *refusal* to do some of the above requisites, I believe we will have a better *leverage* to accomplish the job as you (Hill) wish to have it done." (R. 8345.)[2]

---

1. See Appendix, pp. vi-vii. Defendants contended that non-deliveries were due to a shortage of cars. This cannot stand in the face of Hill's letter to all dealers, at the very time when Emich Motors' delivery problems were most acute, that cars were in abundance. Moreover, if true, defendants could have proved almost conclusively from their own zone delivery records that Emich Motors received its fair share of cars. It is especially significant that they left this avenue of proof untouched. Note defense counsel's concession to the jury that defendants had left this vital question "somewhat up in the air under the evidence." (R. 7280.)

2. To avoid this report, defendants had Hill say (R. 6328-6329): "I disregarded his entire report * * *. I did not pay any attention to Masterson's report." This was said in flagrant antithesis to the fact that Hill read the Masterson report to the jury in the criminal case as representing his frame of mind. (Crim. Rec., 1317-1318.)

Analysis of the Defense. The effect of the holding below that defendants were not afforded "a fair opportunity" to present their defense (R. 9469) is to validate a dishonest defense and to tolerate its extension to the point where confusion and attrition would guarantee a victory.

As previously shown, when defendants openly reversed their strategy in the middle of the trial, they demonstrated their defense to be a sham. (*Ante*, pp. 8-10.)

The defense policy of complete negativism, thereafter pursued, was carried to the extreme of having the four Chevrolet officials responsible for Emich Motors' cancellations,[1] from General Sales Manager Holler down, testify that none of them had *ever* discussed with *any* dealer his non-use of GMAC, nor had *ever* known of *any* case where Chevrolet officials even *asked* a dealer to give GMAC business.[2] For Chevrolet not even to ask dealers for business for its family member is preposterous on its face, but in view of defense counsel's opening admissions, these assertions become ludicrous (*ante*, p. 8), especially in the face of the overwhelming evidence to the contrary:

First, the admissions that Hill and Holler were the only Chevrolet field men on the scene at the inception of the conspiracy (R. 6189-6197, 6778, 6771-6772) in a position to carry out the mandate of defendants' high officials to force the dealers to use the GMAC plan (R. 8070, 6188; see, also, 121 F. (2d) at p. 393—"dealers must use GMAC plan 100% * * * tell our dealers that if they don't do it, we would get a dealer that would.")

Second, a large number of defendants' own documents and other evidence showed that Holler, Doran and Hill

---

1. *Zone Mgr. Hill*—R. 6116-6119; *Reg. Mgr. Smith*—R. 6464-6465; *Asst. Gen. Sales Mgr. Doran*—R. 6563; *Gen. Sales Mgr. Holler*—R. 6756.

2. *Hill*—R. 6171; *Smith*—R. 6473; *Doran*—R. 6625-6626; 6632-6634; 6636, 6637; *Holler*—R. 6781-6783. Hill admitted once suggesting Emich use GMAC (R. 6168).

knew of many instances in which Chevrolet demanded that dealers use GMAC.[1]

Defendants carried their denials to the point where common sense rebelled, *e. g.*: (a) Their unabashed attempt to deny or disparage their own manuals reflecting the joint efforts of defendants to promote GMAC,[2] even by authors thereof. (R. 3259, 4166.) Holler went so far as to disavow paternity of the Chevrolet manual even though it bore his own signature (R. 6821, 6823); (b) their brazen challenge of the veracity of the written reports of GMAC's own employees as to how they coerced dealers to use GMAC with the assistance of the car-selling units;[3] and (c) their paltering with crucial questions concerning their own documents and pre-trial discovery admissions.[4]

To further their defense of expediency, defendants not only engaged in wholesale denials, but also: (1) Obstructed plaintiffs' case by destroying or concealing GMAC's dealer contact reports on Emich Motors, showing exactly how Emich Motors "was constantly urged" to use GMAC. Plaintiffs pressed for this evidence. GMAC, speaking of its own records, responded with a masterpiece of dishonest evasion (R. 1593): "This defendant is *informed and believes* that said reports were destroyed * * *"; (2) attempted to impede plaintiffs' case, as they tried to impede the criminal prosecution, by tampering with wit-

1. R. 8200, 7529, 668, 8151, 8152, 8160, 8161, 8171, 8187, 8191-8192, 8193-8194, 8195-8196, 8198, 8199, 8202-8203, 8204; 634-637, 595, 8032, 8046, 8047, 8187. See, also, Appendix, p. viii.

2. Dozens of present or former employees, *e. g.*, R. 1610-1611, 1627-1628, 1688-1689, 1807-1810, 1852, 1898-1899, 1950, 1988, 2687, 2764, 2783, 2804, 3296, 3451, 3455, 3477, 3478, 5353-5354, 5662. These manuals embodied all the policies, procedures and forms of the defendants. Unless followed to the letter by their thousands of employees, defendants' affairs would have been chaotic.

3. R. 4512-4542, as to R. 8172-8177, 8180-8128; R. 3505-3520, as to 8146-8151; R. 3757-3769, as to R. 8129-8145; R. 3083-3094, as to R. 8139, 8140; R. 4168-4177. Cf with 4456-4472.

4. Who initialled incriminating GMAC reports. Cf. R. 4170-4176 with R. 4457. Own admissions challenged—Sloan, R. 3879-3881; Doran, R. 6637.

nesses,[1] (3) disregarded obligations to the court, even in disobedience to court order, by callously suppressing evidence;[2] and (4) doctored the most vital defense documents and concealed that fact. (R. 8899, 8905.)[3]

Under the foregoing circumstances, petitioners submit that the Court of Appeals should have determined, as a matter of law, that none of the exclusions could have been prejudicial to such a defense.

B. ACCEPTANCE OF SPURIOUS OFFERS OF PROOF AT FACE VALUE.

In accepting at face value the defendants' exhibit 173 for identification and the offer through Stapleton,[4] which, as hereinafter shown, were spurious, the Court of Appeals has placed itself in conflict with the principle of *Scotland County* v. *Hill*, 112 U. S. 183, 186.[5] From that case and

1. *Re* grand jury and criminal trial, Munson, R. 915-916, 8050; *re* present case, Blades, R. 958-959.

2. Suppressing the falsity of Stapleton's testimony, R. 5043, 6587, 6590, 8521, 5207, 6585, 6586, 6577, 6580-6587, 6980-6982; Disobedience to court order, R. 3732-3737, 6727-6730, 7297-7298.

3. These documents were the written cancellation forms as to Emich Motors' dealerships. Since they purported to assert the reasons for the cancellations, they were the most crucial evidence of the defense. But when introduced through Hill, defendants carefully concealed the important facts that the forms merely recorded a decision previously agreed upon and were altered in their most critical content, that is, precisely in those parts which set out the purported reasons for cancellation, demonstrating that the asserted reasons, at best, were inserted as mere afterthoughts, the only question being when (R. 6373-6380; 8510, cf. with R. 6116-6118). The unexecuted file copy was not similarly altered (R. 8510), suggesting that the alterations were made for this case.

4. The good faith of these offers was challenged; Ex. 173—R. 3567, 3571, 8976, 9009; Stapleton—R. 5034.

5. The *Scotland County* case (112 U. S. 183, 186) states that where the "bill of exceptions * * * shows that the offer was actually made and refused: *and there is nothing else in the record to indicate bad faith*," the reviewing court must assume the proof could have been made. (Italics supplied.) From Wigmore on Evidence (3rd Ed.), Vol. I, Sec. 20, pp. 357-361, it appears that the bill of exceptions in the *Scotland County* case would have contained the offer, *the objections*, the ruling *and all other pertinent evidence* which would have illuminated the *bona fides* of the offer. Thus, the *Scotland County* case requires that the reviewing court examine the objections and pertinent evidence in the record, as well as the offer itself, to determine whether the objections are valid.

the cases therein discussed, it appears that where, as here, the good faith of an offer is challenged, and the offer itself, together with other evidence of record, supports the challenge, the reviewing court is not to presume proof would be made as offered. If this were not the rule, the objecting party would be foreclosed from demonstrating upon review that the trial court ruling, even if erroneous, was not prejudicial, leaving him at the mercy of an unscrupulous opponent who may fabricate extravagant and reckless offers posturing moot questions upon appeal.

The amount added to the cash delivered price in an installment sale is the price differential known as the finance charge. Exhibit 173 purports to show that, in 141 selected installment transactions of plaintiffs, five or more so-called "standard 6% non-recourse companies" using the exact 6% plan originated by GMAC would have added a smaller price differential than plaintiffs. (R. 8979, 8986, 8691.)[1]

Apart from the numerous other reasons requiring its exclusion,[2] the rejection of this exhibit was justified because

---

1. Since the exhibit assumes that the 6% plan of the so-called standard companies was 6% in the same way as GMAC's, it is obvious that the true intent of the exhibit was to demonstrate the alleged superiority of GMAC's plan over plaintiff's, a matter not in issue. This is corroborated by the circumstance that during the period in which most of the 141 transactions occurred, the 5 or more companies had not yet developed their own 6% plans (discussed at R. 9507).

2. (a) *Keystone of the price-fixing defense*, see *ante*, pp. 26-29. (b) *Irrelevant:* None of the 141 transactions was represented as having been known to the Chevrolet officials before the cancellation. Moreover, as appears from the face thereof, over ⅓ occurred after the cancellation (R. 8691, 8981); (c) *Cumulative:* See Appendix, pp. x-xii; (d) *Arithmetical Errors: e. g.*, each of the first ten transactions is erroneously computed, one by as much as $10.32, as appears from the face thereof (R. 9514); and (e) *At most, the detailed information was collateral and would have opened the door to a vast amount of evidence which would have further prolonged the trial and distracted the jury from the main issues.*

A comparison of the price differentials of Emich Finance and other discount companies would have drawn into question the details of as many as 1000 separate transactions of Emich Motors. As to each, and with reference to each company used in the comparison, evidence would have to be received of the credit rating of each customer; the amount of down payment; the duration of the installment period; whether the periodic payments were equal or unequal; what types of insurance coverage was provided (*e. g.*, $25 or $50 deductible) and the amount of the

it was patently spurious. Although purporting to show an "average", it omitted about 46% of the total transactions. Aggravating this distortion, defendants eliminated all the discountable transactions, making the comparison moot and pointless because the so-called standard companies would not discount the selected paper. (Discussed at R. 9509-9513.) The worst feature of the exhibit is that it sets up a comparison false on both sides. GMAC's own documents demonstrate the falsity of the assumption, on one side, that the so-called standard companies used a plan which was 6% in the same way as GMAC's. (R. 9508, 8380, 8678.) But the main trick was on the other side, where the insurance premium charge to the customer was grossly understated and plaintiffs' price differential was arbitrarily increased *pro tanto*. (R. 9513-9514.)

The exhibit was one of many attempts to create the inflammatory misimpression that plaintiffs were "fleecing" the public. *That no other purpose was intended thereby becomes clear from defendants' concession that they never attempted to show that Emich Motors' installment prices were higher than those of other dealers using the GMAC plan—in fact, that such prices may have been "lower."* (*R. 9450.*)[1] On this basis, the most that the exhibit could show, even if honestly constructed, was that one element

---

so-called dealer's reserve set up for dealers (Objections, par. 2, R. 8975, 8908, 2936, 3401).

With all such evidence adduced, the reasonableness of the price differentials compared would depend largely upon the opinion testimony of experts in automobile insurance and finance. (R. 4204.)

In view of GMAC's standard practice of giving the dealer's a "secret profit" of 50 to 60% of the price differential (R. 739, 8069), which Sloan justified as sound business (R. 3803), the issue finally presented would be whether Emich Finance's profit was unreasonable compared to the secret profit paid by GMAC, or other so-called 6% companies. As the trial court diagnosed the situation (R. 2940):

> "* * * to allow this evidence to go in * * * it would be necessary to open the door to the trial that each finance company's rates were most unreasonable. I am afraid we are going to get the jury off the main issues in the case."

1. That defendants never attempted to prove that Emich Motors' customers paid a higher installment price was not conceded by defendants until after the Court below had written its original opinion.

entering into the total price was out of line—although the total price was not; thus, in no sense a demonstration that the public was being fleeced.

The Stapleton offer went to the same frivolous matter. With defendants' concession in mind, what purpose other than to inflame could be served by the far-fetched offer to show Emich's supposed instructions to his employees to "gyp poor people"? The whole offer was sheer invention, besides being irrelevant. (Discussed at R. 9500-9502; 5034.)

C. SERIOUS MISSTATEMENTS OF THE RECORD BY THE COURT OF APPEALS.

The opinion is founded upon a number of grave misstatements of the record; *e. g.*: (1) a supposition that the trial court excluded "some 60" letters (R. 9465-9466), when, in fact, not only was no such ruling made, but the letters were never produced, marked or offered and are not in the record, and thus their vital contents, if the "letters" exist, are entirely unknown. (Discussed at R. 9496-9497.) This holding is in direct conflict with *Palmer* v. *Hoffman*, 318 U. S. 109, 116; and (2) a gross distortion of the sense of a statement of plaintiffs' counsel, "You are going to rule us out of court if you make that ruling," as though it were a concession that defendants' offered evidence of comparative finance charges was made in good faith and was conclusive proof that Emich Motors' cancellation was effected because of alleged "overcharges." (R. 9461, 9465.)[1] Others are discussed at R. 9495-9496.

1. This statement was made when defendants sought to introduce evidence of an alleged "overcharge," as to which plaintiffs' counsel said: "As to whether or not it is an overcharge, we have to go into all phases of comparison." (R. 4798.) At that time the trial was almost 3 months old. (R. 4779, 115.) Six weeks earlier the same counsel expressed his fear that opening the record to such evidence would "keep this case going for a year," as intended by defendants. (R. 2936.) In short, the remark was merely a prediction that if such evidence were to be admitted, the trial would outlast both jury and counsel.

D. FAILURE TO TAKE INTO ACCOUNT THAT THE EXCLUDED EVIDENCE WAS MERELY CUMULATIVE.

The Court below ignored the evidence demonstrating beyond dispute that the excluded offers would have been merely cumulative (discussed at R. 9498-9499).[1]

E. FAILURE TO SEPARATELY CONSIDER EACH EXCLUSIONARY RULING.

It is elementary that each exclusionary ruling must be judged separately on its own merits in determining whether it can be sustained, either on the basis of the ground assigned, or on other valid grounds. *Helvering* v. *Gowran*, 302 U. S. 238, 245-246. Yet the Court below repeatedly violated this rule.

Outstanding examples are "some 60" letters (*ante*, p. 41), Exhibit 173 and the offer through Stapleton (*ante*, pp. 39-41), and the offer through GMAC employee Moore which, contrary to the Court below (R. 9466), was not an instance of a misapplication of the hearsay rule (discussed at R. 9502-9503; see, also R. 9499-9501).

The over-all effect of these gross departures from settled principles of review was to overturn a judgment on the

---

1. *Service Complaints:* Defendants had the benefit of 30 witnesses and 29 defense exhibits (as well as 28 plaintiffs' exhibits bearing on this subject) and fully argued the significance of this evidence to the jury (*e. g.*, a "deluge of complaints," "a lot of evidence," R. 7354-7355).

Finance complaints and finance charges: defendants were permitted to introduce all evidence of alleged fraudulent transactions. They called 6 customers, through whom 10 exhibits were adduced; also, 6 present or former employees of Chevrolet—totalling 12 witnesses and 10 exhibits. Apart from alleged fraud, defendants had the benefit of testimony of 7 customers and 4 exhibits relating thereto; plus 7 present or former employees of Chevrolet, plus 5 more defense exhibits, and Chevrolet's manual (R. 7716-7717); also, as a background for the consideration of this evidence, the testimony of 15 more present or former officers or employees of defendants and 29 more of defendants' documents in evidence. (See Appendix, pp. ix-xii.)

On the basis of this evidence, respondents fully argued to the jury their contention that Emich Motors' cancellation resulted from petitioners' finance "overcharges" and customer complaints relating thereto and not because of a criminal conspiracy. (R. 7280, 7282-7283, 7299, 7301, 7320, 7323-7324, 7347, 7354.)

basis of a wholly fictitious conception of the record—a judgment won at great cost and sacrifice in a jury case of historical length. The result is obnoxious to basic concepts of fairness, and requires correction.

V.

The Court Below Has Revived Obsolete Standards of Certainty and Has Imposed Severe Handicaps of Proof as to Damages, in Conflict With the Decisions of This Court and the Public Policy Expressed by Statute.

The Court below viewed the case as though proof of injury and damages was confined to an irresponsible guess by Fred Emich and equally irresponsible testimony by plaintiffs' accountant. (R. 9467-9468.) This view is completely belied by the record, which includes, among other things, the irrefutable evidence of Chevrolet's arbitrary withholding of cars from Emich Motors in the years in question.[1]

Under these circumstances, to hold Fred Emich's testimony to be inadmissible is to disregard this Court's decision in *Story Parchment Co.* v. *Paterson Paper Co.*, 282 U. S. 555, 567. See, also *Rankin* v. *Assoc. Bill Posters*, (C. A. 2) 42 F. (2d) 152, 155.

Equally unfounded are the suppositions of the Court below as to Lynch's testimony. (R. 9467-9468.)

By holding that an experienced certified public accountant may not testify as to what the books of account showed unless he has first made an audit of the underlying records (R. 9468), the Court below pronounced a rule having severe repercussions in the law of damages. If the accountant

1. Examples: *1934*—severe delivery problems until June. In June, 118 cars were sold when the strictures were temporarily alleviated, compared to 46 in May. (R. 8287, 6797, 1085, 8284.) *1935*—couldn't obtain cars even when admittedly abundant (Feehan's many letters listing numerous unfilled orders). (R. 8346-8356, 8359-8361; 8357-8358.) *1936*—demoralization of sales force after notice of cancellations in September. 51 unfilled orders listed. (R. 8444, 1458.) See Appendix, p. vi.

were required to make a detailed verification of the books for the 4½ year period involved, ending over ten years before the trial, the expense of presenting damage evidence would be prohibitive, particularly when added to all the other expenses of the case.

This ruling is contrary to public policy, as expressed in 49 Stat. 1561 (U. S. C., T. 28, former Sec. 695, now Sec. 1732), which, insofar as pertinent, provided:

> "In any court of the United States * * * any writing or record, * * * in the form of an entry in a book * * * made as a memorandum or record of any * * * transaction * * * shall be admissible as evidence of said * * * transaction * * * if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such * * * transaction * * * or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility * * *."

The record shows that the books were fully qualified for admission pursuant to this statute and were made available to defendants in the court room. (See discussion at R. 9525-9526.) Moreover, the books had been audited during the years in question and the audit reports were available to plaintiffs' accounting expert. (See discussion at R. 9526.) Further, Chevrolet received monthly financial statements from Emich Motors and examined its books monthly.[1]

---

1. The defendants never seriously attacked the dealership books except as to whether they balanced. (R. 7296-7297.) That they did balance was demonstrated by cross-examination of defendants' accounting expert. (R. 3922-3926, 4024-4030.)

Defendants were in no position to attack the dealership's books. They were always open to examination by Chevrolet which was paid for bookkeeping supervision. (R. 8267, 8219-8220, 63, 91, 7684-7685, 1201, 1203.) In fact, defendants never briefed any arguments to the Court of Appeals concerning the verity of the books, so that the holding in this respect was purely gratuitous as well as unwarranted by the record.

The books having been qualified under the statute, and having been made available to defendants in the court-room, it is immaterial that they were not introduced, particularly where, as here, no objection was made that they were not introduced.

Under these circumstances, it is clear that the accounting expert may testify as to what the books showed without first making an audit. *Stephens* v. *U. S.* (C. A. 9), 41 F. (2d) 440, 444, citing Wigmore on Evidence, (2nd Ed.), Sec. 1230; *Burton* v. *Driggs*, 87 U. S. 125, 135-136; *Hartford Accident & Indemnity Co.* v. *Collins-Dietz-Morris Co.* (C. A. 10) 80 F. (2d) 441, 444; *People* v. *Sawhill*, 299 Ill. 393, 403-404; *Welch* v. *Shumway*, 232 Ill. 54, 71.

Other matters concerning damages have been sufficiently indicated for present purposes at p. 11, *ante*.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS DODD HEALY,
HAROLD STICKLER,
A. BRADLEY EBEN,
Counsel for Petitioners.

Dated: July 19, 1950.